Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	)	WC Docket No. 11-59

REPLY COMMENTS OF SUNESYS, LLC

SUNESYS, LLC

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INTRODUCTION AND SUMMARY

Sunesys, LLC ("Sunesys") hereby submits its reply comments in response to the Notice of Inquiry (the "Notice") in the above captioned proceeding.

In the Notice, the Commission asks whether it should initiate a rulemaking to adopt rules to clarify the meaning of Section 253.[1] The initial comments filed in this proceeding clearly establish that the answer to that question is yes.

Disputes regarding access to public rights of way greatly delay and undermine the deployment of broadband services. As the Commission has stated on numerous occasions, (1) broadband deployment is critical to the future of this country; and (2) timely and reasonably priced access to necessary governmental rights of way is critical to broadband deployment.[2] Thus, disputes regarding access to, and charges for, use of the public rights of way can delay or even derail broadband deployment, thereby undermining the Commission's goals and the public's interests.

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[1] Notice ¶ 10.
[2] E.g., id. ¶¶ 1, 4.

As Sunesys stated in its initial comments in this proceeding, at a minimum, the Commission should commence a rulemaking to clarify and resolve the following questions that greatly impact broadband deployment:

1. How much time should a local government have to grant access to public rights of way in connection with the provision of broadband services, and should a timeline be instituted?

2. What are the appropriate limits on charges for access to the rights of way in connection with the provision of broadband services?

3. Are discriminatory fees and discriminatory access restrictions permissible at all, and, if so, under what limited circumstances?

4. What is the appropriate standard under Section 253(a)?

5. What is the permissible scope of local governments' rights of way management and what extra burdens are the local governments permitted to place on providers, if any?

6. What is the extent of the Commission's authority under Section 253?[3]

DISCUSSION

I. The Comments of Providers Strongly Support the Need for the Commission to Initiate a Rulemaking to Resolve Many Critical Issues Relating to Section 253

A. The Commission Should Initiate a Rulemaking to Clarify How Much Time a Local Government Has to Grant Access to Public Rights of Way in Connection With the Provision of Broadband Services, and to Determine Whether a Timeline Should be Instituted

As Sunesys stated in its initial comments, the responsiveness of local governments to Sunesys' request for access to public rights of way varies tremendously,

[3] Comments of Sunesys, WC Docket 11-59 (July 18, 2011) at 2-9 ("Sunesys Comments").

as some localities respond quickly while others take enormous amounts of time to provide access, with the process sometimes taking longer than a year.[4]

As the comments in this proceeding establish, numerous other providers are having the same difficulties with many local governments. Verizon stated that based on its experiences "[l]ocalities also can coerce carriers into paying outlandish fees by delaying negotiations, leaving sunk investments stranded until carriers accede to their demands."[5] The National Telecommunications Cooperative Association ("NTCA") commented that "[w]hile some members reported a predictable, streamlined process for obtaining rights of way and wireless facilities siting, others report substantial difficulties, delays and expenses."[6] NTCA concluded that its members have found that "[w]hile some [local governments] respond to requests timely and reasonably, some do not."[7] This is exactly what Sunesys has experienced as well.

Similarly, CTIA's members are sufficiently concerned about the delays occurring with respect to access to public rights of way, that CTIA recommends that the Commission "impose a Section 332(c)(7)-like shot clock on local right-of-way procedures under Section 253 if the record in this proceeding shows the same magnitude of problems with timely rights-of-way decisionmaking as it did with local zoning boards in the *Shot Clock Declaratory Ruling*."[8]

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[4] Id. at 2-3.
[5] Comments of Verizon and Verizon Wireless, WC Docket 11-59 (July 18, 2011) at 20 ("Verizon Comments").
[6] Comments of the National Telecommunications Cooperative Association, WC Docket 11-59 (July 18, 2011) at 2 ("NTCA Comments").
[7] Id. at 3.
[8] Comment of CTIA-The Wireless Association, WC Docket 11-59 (July 18, 2011) at 37 ("CTIA Comments").

As CTIA reasoned,

> Section 332(c)(7) and Section 253 are alternative avenues for achieving the same Congressional objective, *i.e.*, elimination of state and local barriers to competitive entry by providers of telecommunications services, including wireless carriers. In the Section 332(c)(7) context, the Commission found that state or local approval of tower siting is a "crucial requirement" for successful deployment of wireless services. This is equally true where the state or local approval at issue involves a wireless carrier's use of a public right-of-way. Yet, as observed in the National Broadband Plan, "a coordinated approach to rights-of-way policies has not taken hold," and disputes under Section 253 have lingered for years, both before the FCC and in federal district courts.... Simply put, any regulatory model that potentially denies consumers access to new wireless services for years due to a right-of-way dispute is not in the public interest and warrants reexamination.[9]

Of course, CTIA's analysis is equally applicable to wireline providers who also should not be required to wait years to provide broadband services due to rights of way delays. Indeed, the Commission has already imposed deadlines on local governments with cable franchises and local zoning, and on utilities with respect to access to poles. The Commission should certainly consider a timeline here as well and should commence a rulemaking to resolve this issue. As Sunesys stated in its initial comments, "[o]ne way to speed up the deployment of broadband is to impose a timeline for the issuance of permits for public rights of way access. One reason delays occur is that local governments do not have a fixed deadline in which they need to comply, and as a result many take far longer than needed."[10]

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[9] Id. at 37-38.

[10] Sunesys Comments at 3.

B. The Commission Should Initiate a Rulemaking to Clarify the Appropriate Limits on Charges for Access to the Rights of Way in Connection With the Provision of Broadband Services

As Sunesys stated in its initial comments, the charges local governments seek to impose on Sunesys for use of rights of way also vary tremendously, with some charging reasonable fees, while others seek to impose franchise-like fees – 3% to 5% of the revenue received by the provider in that jurisdiction – which bear no relationship whatsoever to the extent of the use of the rights of way or the cost of providing access. That is, the same charges apply regardless of how much right of way is occupied, which can range from a few feet to many miles. [11]

Other providers have the same complaints. In its comments, Verizon stated that it has "encountered numerous examples of excessive right-of-way fees."[12] Verizon then provided several examples of the excessive fees it has encountered, including in New York, Oklahoma, Washington and Oregon.[13] Level 3 Communications, LLC ("Level 3") similarly raised concerns about the excessive fees that it confronts, including fees imposed by the New York State Thruway Authority that Level 3 claims "are so exorbitant and divorced from prevailing rates as to prevent Level 3 from providing telecommunications service – including middle-mile broadband transport – to communities in New York State.[14] Similarly, CenturyLink, LLC ("CenturyLink") commented that it "has experienced too many instances in which local governments have imposed excessive, discriminatory, and/or unfair and unbalanced fees and other terms of

[11] Id.
[12] Verizon Comments at 18.
[13] Id. at 17-21.
[14] Comments of Level 3 Communications, LLC WC Docket 11-59 (July 18, 2011) at 2 ("Level 3 Comments").

access for use of the [public rights of way] that have little or no relationship to the actual cost of managing the [public rights of way]....These fees have diverted and continue to divert funds from the deployment of broadband infrastructure."[15] CenturyLink concludes as follows:

> The Commission should adopt a rule specifying that charges for use of the [public rights of way] are "unreasonable" under Section 253(c) to the extent they exceed the costs incurred by the local government in managing and maintaining the [public rights of way]. As the Commission notes in its *NOI,* there has been disagreement among carriers and local governments as to whether it is reasonable to allow governments to assess a "market value" rate as part of its [public rights of way] fee calculations. The Commission should issue a rule that sets a presumptively valid [public rights of way] fee level at no more than the local government's proven costs for managing and maintaining the [public rights of way].[16]

The National Cable and Telecommunications Association ("NCTA") commented that its members also face high fees imposed by localities that discourage broadband deployment in the areas where such excessive fees are imposed.[17] In addition, NTCA found that an informal poll of its members shows that the rights of way charges are "an area of great concern. Some members reported that rights of way are seen by local jurisdictions as a means of raising revenue unrelated to the costs associated with the permitting process...."[18]

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[15]Comments of CenturyLink, LLC WC Docket 11-59 (July 18, 2011) at 2 ("CenturyLink Comments").

[16] CenturyLink Comments at 4. CenturyLink adds that "with the advent of myriad forms of competition from providers not directly using the [public rights of way], these revenue-generating fees [of localities] create an unlevel playing field where incumbent carriers and their customers are subsidizing governmental programs having nothing to do with the [public rights of way], while many competitors and their customers are not being required to do so."

[17] Comments of the National Cable & Telecommunications Association, WC Docket 11-59 (July 18, 2011) at 3 ("NCTA Comments").

[18] NTCA Comments at 2.

In short, excessive rights of way fees certainly appear to be undermining broadband deployment. Moreover, the law is unsettled as to whether local governments can charge only their costs for use of their rights of way, or whether they can make a profit on such use, and if they can make a profit, what are the limits on their charges. The time for that issue to be resolved has clearly arrived.

C. The Commission Should Initiate a Rulemaking to Clarify Whether Discriminatory Fees and Discriminatory Access Restrictions are Permissible

As Sunesys stated in its initial comments,

> In some jurisdictions, the discrimination regarding the rates for access to the public rights of way could not be more stark. In those jurisdictions, while CLEC's pay a percentage of their revenues for the right to receive access, ILECs pay nothing at all. Discrimination clearly exists in these instances. In fact, discrimination likely exists whenever two competitors are charged different rates for access based on different formulas.
>
> Discrimination also exists where local governments impose far greater limitations on one group of providers' access as compared to another. Some jurisdictions, for example, require new providers to install their facilities underground while continuing to permit other providers to install their facilities on poles, which is far less expensive. Such discrimination cannot be justified, and it is extremely detrimental to broadband competition.[19]

The comments in this proceeding demonstrate that Sunesys is not the only party concerned about such stark discrimination. Verizon, for example, commented that "[l]ocalities may also abuse their control over public rights of way by favoring some providers over their competitors. Discriminatory fees make fair competition impossible and interfere with the Commission's goal of encouraging competitors to deploy facilities."[20] Verizon describes discriminatory fees that it has encountered in Oregon and

[19] Sunesys Comments at 4.
[20] Verizon Comments at 21.

North Carolina. Verizon states that in Eugene, Oregon it is subject to paying a higher percentage of fees that is applied to a broader base of revenue than the incumbent carrier, and in Greensboro, North Carolina, the ILEC does not pay for use of public rights of way for its local exchange networks, but competitive LECs must pay $1.75 per linear foot.[21] Verizon further notes that "some localities have no process in place for providing non-incumbent providers with access to rights-of-way, [and as a result these] providers may therefore be subjected to lengthy delays as they negotiate the first such agreement with the locality."[22]

In addition, CenturyLink stated that it has experienced many instances of discriminatory fees, including a situation where a city sought to evict CenturyLink for refusing to pay a 5% franchise fee where the incumbent had a perpetual grant of use.[23] Moreover, NCTA states that "[d]iscriminatory rights of way fees are another issue that cable providers have encountered. Through a combination of state law and local municipal ordinances, unequal municipal rights of way fees are assessed on companies who provide services in direct competition with each other." [24]

In light of the foregoing, the Commission should initiate a rulemaking to clarify whether discriminatory fees and access restrictions violate Section 253. This fundamental issue needs to be resolved, as it is axiomatic that discriminatory fees and access restrictions, including those discussed in the comments referenced above, greatly undermine broadband deployment and competition. When the playing field is unlevel, it is extremely difficult to compete.

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[21] Id. at 21-22.
[22] Id. at 22.
[23] CenturyLink Comments at 2, 9-10.
[24] NCTA Comments at 3.

D. The Commission Should Initiate a Rulemaking to Clarify the Appropriate Standard Under Section 253(a)

The Commission has repeatedly interpreted Section 253(a)[25] to bar any regulation that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment,"[26] and many courts agree with the Commission as to this construction of the law.[27] As a result of this interpretation, the Commission has taken a common sense – and pro-deployment – approach and struck down (or cast doubt over) a number of legal requirements that did not literally prevent a provider from providing service.[28] However, other courts have reached contrary holdings.[29]

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[25] Section 253(a) provides that "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

[26] See Memorandum Opinion and Order, *California Payphone Association*, 12 FCC Rcd 14191, 14209, ¶ 38 (1997) ("California Payphone Assoc. Order"); Memorandum Opinion and Order, *In re Public Utility Commission Of* Texas, 13 FCC Rcd. 3460, 3470, ¶ 22 (1997) ("PUC of Texas Order"); Memorandum Opinion and Order, *CI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, n.106 (1997) ("TCI Order") ¶ 98.

[27] *Level 3 Communications v. City of St. Louis*, 477 F.3d 528, 533 (8th Cir. 2007) (a requirement that materially interferes with a carrier's ability to compete in a fair and balanced market violates Section 253(a)); *P.R. Tel. Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (citing California Payphone Assoc. Order); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271 (10th Cir. 2004).

[28] *See, e.g.*, PUC of Texas Order, ¶¶ 74-75 (Commission ruled that Section 253 preempted a state law requirement that new local telecommunications companies must use some facilities not owned by the incumbent); Memorandum Opinion and Order, *Petition of the State of Minnesota*, 14 FCC Rcd 21697, 21709, ¶ 22 (1999) ("*Minnesota Order*") (Commission raised doubt over validity of an agreement providing a developer with exclusive access to certain rights of way alongside a highway, because the agreement could harm facilities-based providers, as the evidence indicates that rights of way other than the highway rights-of-way would be substantially more expensive); *Western Wireless Corporation*, 15 FCC Rcd 16227, 16231, ¶¶ 7, 8 (2000) (Commission stated that a universal funding mechanism that only benefited incumbent LECs would likely violate Section 253(a)); TCI Order, ¶ 105 (Commission expressed concern

Not surprisingly, many commenters agree with Sunesys that the appropriate standard under Section 253(a) must be clarified as it directly impacts the extent to which local laws are permitted to detrimentally undermine broadband deployment. CenturyLink states that "Section 253 has been inconsistently applied [and] [b]ased on the inconsistency in the case law, the Commission's logical first step – before implementing any type of voluntary mediation or best practices programs – is to use its rulemaking authority to implement and clarify Section 253."[30] CenturyLink discusses in great detail the history of how the inconsistency in the interpretations has arisen and the need for resolution.[31] It is clear that CenturyLink is correct on this point.

CenturyLink recommends that "[t]o resolve the conflict in the case law and confusion in the industry, the Commission should adopt a rule affirming its *California Payphone* standard as being the applicable standard under Section 253(a). The Commission specifically should adopt a rule that a local regulation is effectively prohibitive under Section 253(a) if it 'materially limits or inhibits the ability of a provider to compete in a fair and balanced legal and regulatory environment.'"[32]

Verizon also agrees that the Commission should clarify the meaning of Section 253.[33] Level 3 strongly agrees as well, and suggests that with respect to charges for access and other requirements, the Commission should use the following standard:

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regarding validity of provisions that required "franchisees to interconnect with other telecommunications systems in the city for the purposes of facilitating universal service, provide[d] for regulation of the fees charged for interconnection, and mandate[d] 'most favored nation' treatment for the [municipality].").

[29] See, e.g., *Time Warner Telecom of Oregon, LLC v. City of Portland*, 322 Fed. Appx. 496 (9th Cir. 2009).

[30] CenturyLink Comments at 3.

[31] Id. at 11-18.

[32] Id. at 17.

[33] Verizon Comments at 25-32.

> Charges for access to public rights-of-way, or other legal requirements, have the effect of prohibiting the provision of any telecommunications service by any telecommunications provider in violation of § 253(a) if they impose a franchise fee or rent (or other material obligation) that, if applied more broadly by a significant percentage of state and local governments, would materially inhibit or limit the ability of any competitor or potential competitor to offer telecommunications services or compete in a fair and balanced legal and regulatory environment.[34]

While Sunesys tends to agree with CenturyLink and Level 3 as to the proper resolution of those issues, that is a matter the Commission need not revolve today. All the Commission needs to resolve now is that the standard for Section 253(a) must be clarified. Sunesys believes it is frivolous to argue that the law should remain muddled, given the importance of access to public rights of way in connection with the delivery of broadband services.

E. The Commission Should Initiate a Rulemaking to Clarify the Permissible Scope of Local Governments' Rights of Way Management and What Extra Burdens May the Local Governments Place on Providers, if Any

In the TCI Order, the Commission held that appropriate rights of way management included "coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them."[35] Similarly, in *In re Classic Telephone*, the Commission found that the legislative history sheds light on permissible rights of way management functions under section 253, as the Commission stated as follows:

> During the Senate floor debate on section 253(c), Senator Feinstein offered examples of the types of restrictions that Congress intended to permit under section 253(c), including State and local legal requirements that: (1) regulate the time or location of excavation to preserve effective

[34] Level 3 Comments at 7.
[35] TCI Order ¶ 103.

> traffic flow, prevent hazardous road conditions, or minimize notice impacts; (2) require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies; (3) require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation; (4) enforce local zoning regulations; and (5) require a company to indemnify the City against any claims of injury arising from the company's excavation.[36]

Notwithstanding these FCC Orders, local governments today often overreach with respect to their rights of way management, and in numerous instances such efforts have been struck down by the courts, including in the following circumstances:

- Requirements that a provider supply extra capacity for the municipality.
- Laws that provide local governments with virtually unlimited discretion with respect to whether to grant access to rights of way.
- Laws providing a local government with virtually unlimited discretion with respect to removal rights (with regard to the providers' facilities) after access has been granted.[37]

Commenters agree with Sunesys that it is important to clarify the law on these issues. Verizon comments that "[i]n exchange for access to rights-of-way, localities may require donations of equipment, network connectivity, services, or dark fiber. These requirements may be as costly – or even more so – as the excessive fees" and can enable the localities to compete against the providers using what is in essence the providers "forced donations."[38] NTCA stated that,

> Another area of significant concern [for its members] is the imposition of requirements not directly relevant to the intended use of the rights of way. NTCA has heard concerns from members regarding requirements ranging from the provision of laptops to the delivery of free connectivity to government buildings. These requirements are unnecessary and unrelated to

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[36] *In re Classic Telephone*, 11 FCC Rcd 13082, 13019, ¶ 39 (1996).
[37] See Comments of AT&T Inc., WC Docket No. 09-153 (October 15, 2009) ("AT&T Comments") at 5 & n. 9, 11 and 13.
[38] Verizon Comments at 23.

rights of way, delay the delivery of broadband to consumers, and in the end drive up the cost of service.[39]

F. The Commission Should Initiate a Rulemaking to Clarify the Extent of the Commission's Authority Under Section 253

Sunesys strongly believes that the Commission has the power to decide whether to preempt local governmental action under Section 253, even where a local governmental entity claims that its action is protected under Section 253(b) or (c). Other commenters agree.[40] In fact, both Level 3 and Verizon provide an extensive analysis that clearly shows Sunesys is correct on this issue.[41] But, once again, the Commission need not decide the matter now; the Commission only needs to determine at this time that a decision on this issue is imperative and therefore include this matter in its rulemaking.

II. The Comments of Localities Also Support the Need for Clarification of the Law

In Sunesys initial comments, Sunesys summarized its position as follows:

> For the reasons discussed herein, the Commission should commence a rulemaking to adopt rules that will clarify the rights of the parties when providers seek access to public rights of way, including with respect to the matters discussed below. Given the critical importance of broadband deployment to the future of this country, and the need for broadband providers to have access to governmental rights of way on a timely basis and at a reasonable cost, it is extremely important that disputes regarding access and fees be kept to a minimum. But that can only occur if the law under 47 U.S.C. § 253 ("Section 253) is clarified on the fundamental issues discussed herein. Without such clarifications, these issues will be litigated time and time again, to the benefit of no one – and to the tremendous detriment of broadband consumers and the Commission's goal of broadband deployment. There is no upside whatsoever to having these fundamental issues continue to be left unresolved – fifteen years after the passage of the 1996 Act. The time to address these matters, and clarify the law, is now, and thus a rulemaking should be promptly commenced. Uncertainty only discourages investment, creates additional delay, and

[39] NTCA Comments at 2.
[40] Level 3 Comments at 22-31; Verizon Comments at 26-29.
[41] Id.

forces providers to expend significant resources on litigation and dispute resolution, rather than on broadband deployment itself.[42]

The localities' comments, if anything, support Sunesys' position as those comments highlight that the views of localities and providers on each of these issues are very different. Of course, no locality even came close to persuasively arguing that it is in the public interest for the law to remain muddled and for everyone to have no idea what is and is not required.

In fact, the localities primarily focused their arguments on why they believe they are correct on these issues, and not why the Commission should forbear from resolving them. For example, the localities raised the counter-intuitive argument that high fees and charges for use of the rights of way would never deter or undermine broadband deployment.[43] This argument is not only counter-intuitive, it is incorrect. As providers made clear in their comments, excessive fees can and do thwart broadband deployments.[44]

In addition, localities argued that if they act in a manner inconsistent with broadband deployment the remedy is for their constituents to vote the local government officials out of office, and not for the Commission to prevent localities from stifling broadband deployment.[45] Of course, constituents vote for their local government officials based on numerous factors, not just one, and those elections do not take place every year. To even request that the Commission rely on a "voting out of local government officials solution" as the means to ensure that localities do not undermine

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[42] Sunesys Comments at 1-2.
[43] Comment of the National League of Cities, et. al, WC Docket 11-59 (July 18, 2011) at 7-16 ("NLC Comments").
[44] See e.g., Verizon Comments at 24-25; NCTA Comments at 3.
[45] NLC Comments at 16.

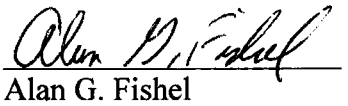
broadband deployment speaks volumes about the merit (or lack thereof) of the localities' arguments. In sum, it is clearly time for the Commission to initiate a rulemaking to resolve these issues.

CONCLUSION

For all of the foregoing reasons, the Commission should commence a rulemaking on the issues addressed herein.

Respectfully submitted,

SUNESYS, LLC



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